

State of South Dakota

SEVENTY-FOURTH SESSION
LEGISLATIVE ASSEMBLY, 1999

743C0467

HOUSE ENGROSSED NO. **HB1107** - 2/5/99

Introduced by: Representatives Cutler, Broderick, Chicoine, Fiegen, Fischer-Clemens,
Peterson, and Wilson and Senators Olson, Munson (David), Reedy, Rounds,
and Shoener

1 FOR AN ACT ENTITLED, An Act to revise certain provisions regarding mutually binding
2 agreements between beer wholesalers and brewers, to revise a term relative to beer industry
3 relationships, and to make provisions for malt beverage brand extensions.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

5 Section 1. That § 35-8A-12 be amended to read as follows:

6 35-8A-12. Any waiver of the rights or remedies granted by this chapter is void. However,
7 nothing in this chapter limits or prohibits suppliers and wholesalers from entering into mutually
8 binding written agreements as defined in this chapter or to limit or prohibit good faith dispute
9 settlements voluntarily entered into by the parties. However, no provision of any written
10 agreement may purport to require the law of any state other than South Dakota to govern the
11 relationship of the parties or to require wholesalers to waive the right to have disputes with their
12 suppliers resolved in courts of competent jurisdiction in South Dakota or to require a wholesaler
13 to waive the right to trial by jury in South Dakota.

14 Section 2. That § 35-8A-9 be amended to read as follows:

15 35-8A-9. Any party to a distribution agreement aggrieved by a violation of any provision of
16 this chapter may seek injunctive relief enjoining the violation and recovery of damages caused

1 by the violation. The prevailing party to any action charging a violation of this chapter is entitled
2 to recover costs of suit and reasonable attorney's fees. Relief shall be sought in a civil action
3 brought in the circuit court for the county in which the ~~wholesaler has his~~ wholesaler's principal
4 place of business is located, ~~or in any other court of competent jurisdiction, whether state or~~
5 ~~federal~~ or in a federal court of competent jurisdiction located in South Dakota.

6 After a dispute arises, arbitration shall proceed only if all parties agree, at that time, to submit
7 the dispute to arbitration and that the decision of the arbitrators shall be final and binding. The
8 dispute shall be submitted to a panel of three arbitrators. One arbitrator shall be selected by the
9 supplier within thirty days after the parties have agreed to arbitrate. One arbitrator shall be
10 selected by the wholesaler within thirty days after the parties have agreed to arbitrate. The third
11 arbitrator shall be selected from a list of five candidates supplied by the American Arbitration
12 Association at the request of the parties and made within ten days after the parties have agreed
13 to submit the dispute to arbitration. Within ten days after receipt of the list, the wholesaler and
14 the supplier may disqualify up to two candidates from the list. The American Arbitration
15 Association shall select the third arbitrator from the candidates not disqualified by the parties.
16 The arbitration shall proceed in accordance with the rules of the American Arbitration
17 Association within thirty days after the selection of the arbitration panel has been completed. The
18 cost of the arbitration shall be borne equally by the parties. The award of a majority of the
19 arbitrators shall be final and binding on the parties.

20 Section 3. That chapter 35-8A be amended by adding thereto a NEW SECTION to read as
21 follows:

22 For purposes of this chapter, the term, brand, means any word, name, group of letters,
23 symbol, or combination thereof, that is adopted and used by a brewer or importer to identify a
24 specific beer product, and to distinguish that beer product from another beer product.

25 Section 4. That chapter 35-8A be amended by adding thereto a NEW SECTION to read as

1 follows:

2 For purposes of this chapter, the term, brand extension, means any brand that incorporates
3 all or a substantial part of the unique features of a preexisting brand of the same brewer or
4 importer and that relies to a significant extent on the goodwill associated with that preexisting
5 brand.

6 Section 5. That chapter 35-8A be amended by adding thereto a NEW SECTION to read as
7 follows:

8 Any brewer or importer, who assigns a brand extension to a wholesaler, shall assign the
9 brand extension to the wholesaler to whom the brewer or importer granted the exclusive sales
10 territory for the brand from which the brand extension resulted. This requirement does not apply
11 to any assignment of a brand extension to a wholesaler that was made by a brewer or importer
12 before the effective date of this Act.

13 Section 6. That chapter 35-8A be amended by adding thereto a NEW SECTION to read as
14 follows:

15 If prior to the effective date of this Act, a brewer or importer assigned a brand extension to
16 a wholesaler who was not the appointed wholesaler for the brand from which the brand extension
17 was made, then any additional brand extension shall be assigned to the wholesaler who first had
18 the brand.

19 Section 7. That subdivision (6) of § 35-8A-2 be amended to read as follows:

20 (6) "Good faith," the duty of each party to any agreement to ~~act in a fair and equitable~~
21 ~~manner in carrying out the agreement~~ deal with the other party in a fair, reasonable,
22 and nondiscriminatory manner consistent with reasonable commercial standards of fair
23 dealing;

24 Section 8. That § 35-8A-4 be amended to read as follows:

25 35-8A-4. No supplier may:

- 1 (1) Induce or coerce, or attempt to induce or coerce, a wholesaler to do any illegal act
2 by threatening to amend, cancel, terminate, or refuse to renew any agreement existing
3 between the supplier and wholesaler, or by any other means;
- 4 (2) Require a wholesaler by any means to participate in or contribute to any local or
5 national advertising fund controlled directly or indirectly by a supplier, unless the cost
6 is allocated fairly to each wholesaler in that market area according to sales to the
7 wholesalers;
- 8 (3) Withhold delivery of malt beverages ordered by a wholesaler or change a wholesaler's
9 quota of a brand or brands if the action is not made in good faith;
- 10 (4) Require a wholesaler to accept delivery of any malt beverages or other item or
11 commodity which was not ordered by the wholesaler or which was ordered but
12 properly canceled by the wholesaler in accordance with the procedures previously
13 established by the supplier. However, a supplier may impose reasonable inventory
14 requirements upon a wholesaler if the requirements are made in good faith and are
15 generally applied to other similarly situated wholesalers of the supplier;
- 16 (5) Require a wholesaler to purchase one or more brands of malt beverages in order for
17 the wholesaler to purchase another brand or brands of malt beverage for any reason;
- 18 (6) Prohibit a wholesaler from dealing in any product not supplied by the supplier,
19 including any product of any other supplier of any other alcoholic beverage or any
20 nonalcoholic product, or in any way attempt to regulate or control ancillary businesses
21 of a wholesaler;
- 22 (7) Fix or maintain the price at which a wholesaler may resell malt beverages;
- 23 (8) Take any action not in good faith against a wholesaler for or because of the filing of
24 a complaint regarding an alleged violation by the supplier of any state or federal law
25 or administrative rule;

1 (9) ~~Require or prohibit without good cause any change in the manager or successor~~
2 ~~manager of a wholesaler who has been approved by the supplier~~ Refuse to approve
3 any proposed manager or successor manager without good cause or require or
4 prohibit any change in the manager or successor manager of a wholesaler who has
5 been previously approved by the supplier without good cause; or

6 (10) Withdraw from or discontinue supplying to a wholesaler one or more brands or
7 packages of malt beverages. However, nothing in this subdivision prohibits a supplier
8 from withdrawing or discontinuing any brand or package on a statewide or on a media
9 coverage area basis at any time on reasonable notice or conducting test marketing of
10 a new brand or of a brand of beer which is not currently being sold in this state.

11 Section 9. That chapter 35-8A be amended by adding thereto a NEW SECTION to read as
12 follows:

13 The provisions of this Act apply to any agreement in existence as of July 1, 1999, as well as
14 any agreement entered into after July 1, 1999. Any written agreement in existence on July 1,
15 1999, which is continuous in nature or which has no specific duration or renewal provision, shall
16 be considered, for the purpose of this Act, to have been renewed ninety days after July 1, 1999.

1 **BILL HISTORY**

2 1/21/99 First read in House and referred to Commerce. H.J. 111

3 2/2/99 Scheduled for Committee hearing on this date.

4 2/2/99 Commerce Do Pass Amended, Passed, AYES 11, NAYS 2. H.J. 313

5 2/4/99 Motion to Amend, Passed. H.J. 383

6 2/4/99 House of Representatives Do Pass Amended, Passed, AYES 63, NAYS 2. H.J. 384